

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000090-001 DT

04/25/2005

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

CITY OF MESA PROSECUTOR

STEPHEN MERCER

v.

ROBIN ALLEN (001)
STACY ANN EZEL (001)

ROBIN ALLEN
MESA CITY COURT
245 W 2ND STREET
MESA AZ 85201
A DOUGLAS LASOTA
DAVID G DERICKSON

MINUTE ENTRY

This Petition for Special Action has been under advisement since March 9, 2005, and the Court has considered and reviewed the record of the proceedings from the Mesa City Court and the pleadings and memoranda submitted by counsel. This court has also received and considered the excellent Amicus Curiae brief submitted by Arizona Attorneys for Criminal Justice. This court's offer of supplemental briefing or oral argument following the filing of the amicus brief was not accepted by any party.

1. Jurisdiction

This Court has jurisdiction over special actions pursuant to the Arizona Constitution Article VI, Section 18, and Rule 4(b), Arizona Rules of Procedure for Special Actions.

The exercise and acceptance of special action jurisdiction in this case is highly discretionary,¹ and therefore, the decision to accept jurisdiction encompasses a variety of

¹ *Blake v. Schwartz*, 202 Ariz. 120, 42 P.3d 6 (App. 2002); *Haas v. Colosi*, 202 Ariz. 56, 40 P.3d 1249 (App. 2002).
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determinants.² Acceptance of special action jurisdiction is appropriate where an issue is one of first impression regarding a purely legal question, is of statewide importance, and is likely to arise again. In this matter, special action jurisdiction will be exercised to resolve a purely legal question of whether the Real Party In Interest Stacy Ezel is entitled to a jury trial for a DUI misdemeanor offense. Moreover, there is a clear issue presented here of county-wide importance to all limited jurisdiction courts, that is likely to arise again. This Court will accept special action jurisdiction in this case.

2. Factual and Procedural Background

The only issue presented in this case is whether the trial judge (the Honorable Robin Allen, Mesa City Court Judge, who is also the Respondent herein) abused his discretion in ruling that Stacy Ezel, the Real Party in Interest, is entitled to a jury trial for DUI charges. On August 12, 2004, Stacy Ezel, was arrested and charged with Driving Under the Influence of an Intoxicating Liquor, in violation of A.R.S. § 28-1381(a)(1) and (2), as well as Driving Under the Extreme Influence of Alcohol, in violation of A.R.S. § 28-1382. A trial commenced on January 10, 2005 and a mistrial was declared. The matter was reset for trial on February 14, 2005. Meanwhile, the Arizona Supreme Court announced its decision in *Derendal v. Griffith*³ on January 14, 2005. As a result, the State filed a motion on February 2, 2005 to remove the DUI case from a jury trial calendar. On February 4, 2005, a pretrial conference was held before the Respondent Judge Allen concerning the motion. After hearing oral argument from both parties on the issue, Judge Allen denied the State's motion based on extensive findings that the Defendant was entitled to a jury trial.⁴ The Mesa City Prosecutor's Office then commenced this Special Action.

3. Issues Presented in this Case

The Petitioner asserts in the Special Action Complaint that (1) Judge Allen abused his discretion by finding that A.R.S. § 28-1381(F) prescribes a statutory right to a jury trial and by (2) employing an improper legal analysis as to whether DUI is a serious offense, and finally, (3) Petitioner argues that there is no common law right to a jury trial for DUI offenses.

I have concluded that there does exist a statutory right to jury trial for misdemeanor DUI offenses, but that there is no constitutional right under the authority of Article II, Section 23 of the Arizona Constitution.

² *State v. Jones ex rel. County of Maricopa*, 198 Ariz. 18, 6 P.3d 323 (App. 2000).

³ *Ariz.*, 104 P.3d 147, 2005 WL 81699 (2005).

⁴ R.T. of February 4, 2005 at page 37-38.

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4. Discussion of the Issues

Recently, the Arizona Supreme Court announced its decision in *Derendal v. Griffith*.⁵ There, the court was asked to consider whether Arizona should retain the previous test set out in *Rothweiler v. Superior Court*,⁶ to determine when the Arizona Constitution mandates that a criminal offense be eligible for trial by jury. In *Rothweiler*, the Court fashioned a test to determine whether a criminal defendant is entitled to a jury trial in a particular criminal offense. Under that test, the court considered: (1) the relationship of the offense to common law crimes; (2) the severity of the statutory penalties that apply; and (3) the moral quality of the act.⁷ In *Derendal*, the Court modified the *Rothweiler* test by eliminating the moral quality analysis. The Court held that the analysis of jury trial eligibility of misdemeanor offenses now requires only a two step process. First, the court must determine whether an offense has a common law antecedent that guaranteed a right to a trial by jury at the time of Arizona statehood.⁸ If so, the inquiry concludes, and a defendant is entitled to a jury trial. If there is no common law antecedent for which a jury trial was required, the court must determine whether the offense is “serious” enough to warrant a jury trial.⁹

In addition to the constitutional right to a jury trial, the Real Party in Interest Ezel has asserted a statutory right to a jury trial for the offenses of DUI and Extreme DUI. The Respondent Judge specifically found a ‘statutory right’ to a jury trial for the offenses charged in this case, based upon his reading of A.R.S. §§ 28-1381(F) and 28-1382(C). For purposes of clarity, this Court will address the ‘statutory right’ to a jury trial issue first, and then proceed to the constitutional analysis.

I have concluded that there does exist a ‘statutory right’ to a jury trial for the offenses of DUI and Extreme DUI, but that there is no ‘constitutional right’ to a jury trial for those same offenses, utilizing the *Derendal* analysis.

A. The Arizona Legislature Has Granted a ‘Statutory Right’ to a Jury Trial For DUI Offenses Under A.R.S. § 28-1381(F) and § 28-1382(C).

The Arizona Legislature has codified the right to a jury trial in DUI cases where the defendant requests a jury trial. A.R.S. § 28-1381(F) provides that:

⁵ Supra.

⁶ 100 Ariz. 37, 410 P.2d 479 (Ariz. 1966), *overruled in part*.

⁷ Id. at 42.

⁸ *Derendal v. Griffith*, 104 P.3d at 156.

⁹ Id.

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At the arraignment, the court shall inform the defendant that the defendant may request a trial by jury and that the request, if made, shall be granted.

This exact language is also codified in the Extreme DUI statute, A.R.S. § 28-1382(C). In addition, this language is also found in each provision of the statutes that proscribe operating a motorized vehicle while intoxicated.¹⁰

This Court reviews *de novo* issues of statutory interpretation as questions of law.¹¹ In interpreting a statute, the Court's task is simply to follow and respect the intent of the legislature.¹² If a statute is "clear and unambiguous," then the judicial interpretation goes no farther than the text. If a statute is ambiguous, then this court can "consider the statute's context, subject matter, historical context, effects and consequences, and spirit and purpose" in addition to its legislative history.¹³ The court must give words their common meaning unless the legislature clearly intended a different meaning.¹⁴

Petitioner argues that A.R.S. §§ 28-1381(F) and 28-1382(C) are merely 'procedural statutes' that do not confer a substantive right to a jury trial. At first glance, whether the provisions in A.R.S. §§ 28-1381(F) and 28-1382(C) are a matter of substance or procedure could permit a conclusion either way. It is well established that matters of substantive law are controlled by statute or constitutional law.¹⁵ A distinction between substantive law and procedural law is defined as follows: "[s]ubstantive law is that part of the law which created, defines, and regulates rights; whereas the procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasions."¹⁶ Substantively, it may be argued that the legislature appears to give the defendant a right to trial by jury and imposes an affirmative duty upon a court to advise the defendant of the right to a jury trial, and mandates that a jury trial be granted upon request. Procedurally, one could argue that the wording relating to a trial by jury is tied to the arraignment, a procedural event. The statutes appear ambiguous as to whether a jury trial is granted as a substantive or procedural right.

In resolving this issue of substance versus procedure, it is worthwhile to inquire into the legislative history and legislative intent behind these statutory provisions. It appears that in 1973, language was inserted in the statute that provided for a right to a jury trial in misdemeanor DUI cases. That was seven years after the Arizona Supreme Court's 1966 decision in Rothweiler holding that the offense of driving while intoxicated was a crime that must be tried before a jury

¹⁰ See A.R.S. § 5-395(M); A.R.S. § 5-397(C).

¹¹ Parrot v. Daimlerchrysler Corporation, ___ Ariz. ___, 2005 WL 549486 (App. 2005); Zamora v. Reinstein, 185 Ariz. 272, 275 (App. 1997).

¹² In re Willputte S., 209 Ariz. 318, 100 P.3d 929 (App. 2004).

¹³ Parrot v. Daimlerchrysler Corporation, slip opinion at 2.

¹⁴ State v. Baraza, 209 Ariz. 441, 175 (App. 2005).

¹⁵ Pima County v. Hogan, 197 Ariz. 138, 140, 3 P.3d 1058, 1060 (App. 1999).

¹⁶ Id., quoting State v. Birmingham, 96 Ariz. 109, 110, 392 P.2d 775, 776 (1964).

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when properly demanded.¹⁷ In 1990, the current version of the Arizona DUI statute was passed. At that time, the Transportation Committee of the Arizona House of Representatives took up the issue of whether the DUI bill being considered should be amended to say that if a defendant requests a jury trial in a misdemeanor DUI case, the request for a jury trial shall be granted. In the midst of the hearings before the Transportation Committee, Rep. Bill Mundell moved an amendment to require that a defendant be informed of his right to a jury trial “at the arraignment.” At this point, Maricopa County Attorney Richard Romley in opposition to Mr. Mundell’s amendment testified that the Supreme Court had “ruled that a person does not have a (constitutional) right to a jury trial for a DUI arrest,” referencing Blanton v. City of North Las Vegas¹⁸:

Richard Romley, in answer to questions, stated that the right to a trial for a DUI arrest was reviewed by the Supreme Court and it ruled that a person does not have the right to a jury trial for a DUI arrest. He noted that this ruling will lessen the time consumed in the DUI cases. Mr. Romley said that there are 26,000 cases pending on DUI’s alone at this time. Question was called and by a hand vote of 5 to 3, the motion carried.¹⁹

Despite Mr. Romley’s testimony, Mr. Mundell’s amendment was passed, as was the bill. Clearly, the Legislature could have stricken all of the language relating to giving the defendant a right to a trial by jury in DUI misdemeanor cases at that time if that was the legislative intent. To the contrary, it appears that the legislature intended to confer a statutory right to trial by jury, where no constitutional right to a jury trial existed, as set forth in Blanton, and summarized by the Maricopa County Attorney.

The Arizona Supreme Court had a chance to comment on the statutes a few years later in McDougall v. Strohson.²⁰ The Court, looking at then numbered A.R.S. § 28-692(M), now A.R.S. § 28-1381(F), which codified the right to a jury trial in DUI cases, recognized the significance of the statute setting forth the right to a jury trial:

[T]he Arizona legislature, with one exception, has never expressed itself on the issue of jury entitlement in any of these types of cases. The exception is A.R.S. § 28-692(M), which codified the Rothweiler rule requiring jury trials, upon request of the defendant, in DUI cases.²¹

¹⁷ Rothweiler, 100 Ariz. at 44, 410 P.2d at 485.

¹⁸ 489 U.S. 538, 542-43, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989).

¹⁹ Minutes of the Arizona House Transportation Committee, March 6, 1990.

²⁰ 190 Ariz. 12, 945 P.2d 1251 (1997).

²¹ Id. at 126.

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And:

The legislature has had over thirty years to express its disapproval of the Rothweiler test, but has not done so. Indeed, in DUI cases, it has codified it (emphasis added).²²

In Derendal, the Arizona Supreme Court made no mention of this legislative enactment of a statutory right to jury trial. Moreover, the Arizona Supreme Court has only overruled that part of the Rothweiler decision that fashioned the test of whether a misdemeanor offense is jury trial eligible. Since Rothweiler, the language granting a defendant the right to a jury trial upon request in a DUI case has been codified by statute.

A recent decision by the Arizona Court of Appeals in another case is helpful because that court has reviewed a similar statutory provision that codifies the right to a jury trial.²³ Specifically, the court reviewed A.R.S. § 8-223:

A hearing to terminate parental rights . . . shall be tried to a jury if a jury is requested by a parent, guardian or custodian whose rights are sought to be terminated.

In deciding whether the statute granted a ‘statutory right’ in this instance, the Court of Appeals focused on the word “shall” in the statute. Analyzing the wording, the court stated that “the use of the word *shall* in this statute is mandatory.”²⁴ The Court of Appeals held that the statute granted a ‘statutory right’ to a jury trial. Likewise, A.R.S. § 28-1381(F) mandates that the court *shall* inform the defendant that he may request a jury trial and that if he or she does request a jury trial, the request *shall* be granted.

Therefore, on the basis of the legislative history and committee notes, applicable standards of statutory construction, I interpret the statutes at issue to codify a legislative intent to grant a criminal defendant charged with a misdemeanor DUI the statutory right to a jury trial. Accordingly, I conclude that the trial judge did not err or abuse his discretion in finding that A.R.S. § 28-1381(F) prescribes a statutory right to a jury trial.

B. The Right to a Jury Trial for DUI Cases at Common Law in Arizona

The Amicus Curiae have done a commendable job in compiling the legislative and legal history of the right to a jury trial in Arizona. This Court is indebted in no small part, to that

²² Id. at 127.

²³ John C. v. Sargeant III, 208 Ariz. 44, 90 P.3d 781 (App. 2004).

²⁴ Id. at 46.

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excellent work. It is quite clear from the hand-written records (attached as exhibits to the Amicus' brief) from the clerks of the various courts throughout Arizona prior to statehood, that jury trials for misdemeanor offenses were regularly held. However, I must disagree with the Amicus and find that such misdemeanor jury trials were held pursuant to statutory authority, rather than common law authority. I cannot find comparable common law offenses to our modern DUI offenses that would provide the common law link, and entitlement to a jury trial.

Article II, Section 23 of the Arizona Constitution provides that the right to a jury trial "shall remain inviolate", and preserves the right to jury trial as it existed at the time Arizona adopted its constitution.²⁵ Thus, the constitution requires that the state guarantee the right to a jury trial to a defendant where the offense charged was granted a jury trial at common law prior to statehood.²⁶

Where the right to a jury trial existed for an offense prior to statehood, the right cannot be denied for modern statutory offenses of the same "character or grade."²⁷ To constitute a common law jury-eligible offense as an antecedent to a modern offense, the modern offense must contain elements comparable to those found in the common law offenses.²⁸

(1) The Right to a Jury Trial Prior to Arizona Statehood

The statutory right to a jury trial in Arizona for misdemeanor offenses can be traced back well before Arizona statehood. Prior to Arizona statehood, defendants were afforded a jury trial in all criminal offenses. In 1863, the United States Congress established Arizona as a Territory. Article 8 of the Territorial Bill of Rights, adopted on October 4, 1864, provided:

The right of trial by jury shall be secured to all, but a jury trial may be waived by parties in civil cases in the manner prescribed by law.

Similarly, the 1887 Arizona Penal Code, also referred to as the Howell Code, the Territory's first Code of Laws, guaranteed every person the right to a jury trial for all public offenses:

Section 14. No person can be convicted of a public offence, unless by a verdict of a jury accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a

²⁵ *Derendal*, 104 P.3d at 150.

²⁶ *Id.*

²⁷ *Id.*, quoting *Bowden v. Nugent*, 26 Ariz. 485, 491, 226 P. 549, 551 (1924).

²⁸ *Id.*

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demurrer to the indictment in the case, mentioned in this chapter.²⁹

Identical language to this provision also appeared in each of the three subsequent revisions of the Arizona Code.³⁰ The Howell Code also contained the following provision, hand-written by the scrivener, regarding the conduct of misdemeanor jury trials:

Sec. 1582. Issues of fact must be tried by Jury unless a trial by jury be waived in criminal cases not amounting to felony by consent of both parties expressed in open court and entered in its minutes. In cases of misdemeanor the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court.³¹

The Howell Code also contained this provision with regard to operating an engine or car while intoxicated:

Section 630. Every person who is intoxicated while in charge of a locomotive engine, or while acting as conductor or driver upon any railroad train or car, whether propelled by steam or drawn by horses, or while acting as a train dispatcher, or as a telegraph operator, receiving or transmitting dispatches in relation to the movement of trains, is guilty of a misdemeanor.³²

The Penal Code of 1901, Section 356, was worded identically to its predecessor, Section 630. The 1901 Penal Code also required that:

Section 1389. In all cases, both at law and in equity, either party shall have the right to submit all issues of fact to a jury.³³

Then, in 1913, the Legislature amended the preceding 1887 and 1901 statutes to list the number of expanded methods of transportation at the time:

Section 398. Every person who is intoxicated while in charge of a locomotive engine, or while acting as conductor or driver upon any railroad train or car, street car, automobile, bus or other vehicle or elevator or hoist, whether propelled by team,

²⁹ The Howell Code, Chapter XI, Part I, § 14.

³⁰ See Laws, Ch. XI, Sec. 583 (1871); Penal Code, Sec. 2217 (1887); and, Penal Code, Sec. 1191 (1901).

³¹ Penal Code, Chapter VI, § 1582 (1887).

³² Penal Code, Title X, § 630 (1887).

³³ Penal Code, § 1389 (1901).

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electricity, gasoline, or other mechanical power, or drawn by horses, or while acting as train dispatcher, or as telegraph operator, receiving or transmitting dispatches in relation to the movement of trains, is guilty of a misdemeanor.³⁴

In *Hasten v. State*,³⁵ Section 398 was interpreted to specifically include motor vehicles. The legislature also added a second statute for good measure:

Sec. 5134(5). Anyone operating a motor vehicle, while in an intoxicated condition, shall be guilty of a misdemeanor.³⁶

From these authorities, I conclude that the statutory right to a jury trial existed in Arizona for all misdemeanor and felony offenses prior to, and at the time of statehood. And, from the exhibits offered by the Amicus, I find irrefutable evidence that jury trials were regularly held for such misdemeanor offenses as simple assault, criminal damage, and disturbing the peace, in Arizona between the years of 1887 to 1911.³⁷

(2) There Are No Common Law Antecedents to DUI

The modern DUI offenses have no common law antecedent offenses that were indictable at common law. In *Urs v. Maricopa County Attorney's Office*,³⁸ the Court held that if an offense is "linked" to a jury trial at common law at the time Arizona adopted its constitution (in 1910), a defendant is guaranteed a jury trial.

The Amicus argues that all unjustifiable disturbances of the public convenience and safety were indictable at common law. Nuisance could be the obstruction of a public way, if the injury is sufficient, and if the obstruction could injure all who may choose to travel that way.³⁹ It has included racing horses on the public highway to the danger of the public.⁴⁰ With regard to nuisance, the 1901 Penal Code stated that:

³⁴ Penal Code, Title XI, § 398 (1913).

³⁵ 35 Ariz. 427, 280 P. 2670 (1929).

³⁶ Penal Code, Title XI, § 5134(5) (1913).

³⁷ Amicus have argued that this court should find that that the Howell Code provisions cited in this opinion, formed the basis for the provision within Article II, Section 23 of the Arizona Constitution granting the right to trial by jury, as that right was widely construed at the time of statehood, and that Arizona's courts have misconstrued and improperly limited the right to jury trial to offenses that are not deemed 'petty' under the authority of *Goldman v. Kautz*, 111 Ariz. 431, 531 P.2d 1138 (1975). However, this Court is without the authority (or inclination) to disregard a published opinion from a higher court. I, therefore, reject the Amicus' invitation to find constitutional authority for misdemeanor jury trials within Arizona's Constitution.

³⁸ 201 Ariz. 71, 31 P.3d 845 (App. 2001).

³⁹ New Commentaries on the Criminal Law Upon A New System of Legal Exposition, Joel Bishop, 8th Edition, 1892, Chicago T.H. Flood and Company, Sections 530, 244 (3).

⁴⁰ *State v. Battery*, 6 Baxt. 545 (Tenn.).

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Section 331. Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by an considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay stream, canal, or basin, or any public park square, street or highway, is a public nuisance.⁴¹

The Amicus also argue that the common law offense of reckless driving can be seen as the functional equivalent of today's DUI. Negligent carriage driving has been recognized by the Supreme Court as a common law offense in *Atwater v. City of Lago Vista*.⁴² Recently in Arizona, in the case of *Urs v. Maricopa County Attorney*,⁴³ a person charged with reckless driving was held to be entitled to a jury trial, because reckless driving was traceable to a common law offense.⁴⁴

The essential elements of DUI, of driving a motor vehicle in the State of Arizona—while intoxicated, are dissimilar to other public nuisance or reckless conduct offenses. The public nuisance statute from the 1901 Penal Code is a general offense that could, in some circumstances, but not all circumstances, include acts constituting a DUI. The crime of reckless driving contains no required element of intoxication, as does our DUI statutes. The primary element of reckless driving is driving in a 'reckless' manner. The object of the prohibition against reckless driving is clear: to protect the public's safety. A similar goal is certainly the object of the DUI statutes, but similar goals or purposes do not constitute common law antecedents.

I conclude that though misdemeanor jury trials regularly occurred in Arizona prior to and at the time of statehood, such jury trials were held pursuant to statutory authority. There are no common law antecedents to the crime of DUI that would entitle a defendant charged with a DUI offense to a jury trial in Arizona.

C. DUI Is Not a 'Serious' Offense

As articulated in *Derendal*, when the legislature classifies an offense as a misdemeanor, punishable by not more than six months incarceration, the offense will be presumed "petty,"

⁴¹ Penal Code, Title X, § 331 (1901).

⁴² 532 U.S. 318. 121 S.Ct. 1536, 149 L.Ed.2d 549

⁴³ 201 Ariz. 71 (App. 2001).

⁴⁴ *Id.* at 72-73.

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falling outside of the jury trial entitlement of Article II, Section 23 of the Arizona Constitution.⁴⁵ To rebut this presumption, a misdemeanor defendant must show that the offense qualifies as a “serious offense.”⁴⁶ First, the penalty must be derived from statutory Arizona law.⁴⁷ Second, the consequence must be severe.⁴⁸

The fines, periods of maximum incarceration for the offenses of DUI all fall within the parameters of other misdemeanor offenses. Even the mandatory jail time is easily within the statutory maximum for misdemeanors of six months.

The Real Party In Interest Ezel and the Amicus argue that loss of driving privileges renders DUI a ‘serious offense’. The Arizona Supreme Court does not recognize driving as a right, but rather, views it as a privilege in this state. The Arizona Supreme Court has held that the potential loss of a driving privilege is not a grave or serious consequence.⁴⁹ Therefore, I find that the Defendant has not met her burden in this case of overcoming the presumption that a DUI misdemeanor offense carries additional severe, direct, statutory consequences that would reflect the legislature’s judgment that the offense is “serious” to entitle her to a jury trial.

4. Conclusion

I find that Arizona law provides a statutory right to a jury trial for DUI offenses, and that the Respondent Judge did not err in denying the Petitioner’s motion to vacate the jury trial scheduled in Ezel’s DUI case pending before the Mesa City Court. I respectfully disagree with the Respondent Judge in his conclusion that the offense of DUI is a ‘serious offense’ entitling Ezel to a jury trial. I also find no common law right to a jury trial for the offenses of DUI.

IT IS THEREFORE ORDERED accepting jurisdiction in this Petition for Special Action relief.

IT IS FURTHER ORDERED denying the relief requested.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

⁴⁵ *Derendal v. Griffith*, 104 P.3d 147, 153, 2005 WL 81699 (Ariz. 2005).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 154.

⁴⁹ *Benitez v. Dunevant III*, 198 Ariz. 90, 96, 7 P.3d 99, 106 (2000).